STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: JANUARY 10, 2023

IN THE MATTER OF:
Appeal Board No. 626195

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination holding, effective June 27, 2022, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10). The

claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by and on behalf of the claimant and on behalf of the employer. By decision filed October 3, 2022 (A.L.J. Case No.), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for the employer's school district as a per diem substitute teacher beginning on September 27, 2021. For the 2021-2022 school year, the claimant was hired as a full-time building substitute teacher assigned to work in the same school every school day from the date of hire until the end of the school year on June 24, 2022.

The per diem rate of pay for substitute teachers in the 2021-2022 was $115 per

day; this rate increased to $130 per day after 20 consecutive days in the same assignment and then increased to $140 per day if the substitute worked in the same assignment for at least three months. The rates of pay for substitute teachers remained the same in the 2022-2023 school year. In the 2021-2022 school year, as a full-time substitute teacher in the same assignment for the school year, the claimant earned $140 per day. She worked on 138.5 school days in the 2021-2022 school year.

In addition to the hiring of full-time building substitute teachers in the 2021-2022 school year, the employer utilizes a system known as AESOP to call per diem substitutes teachers to offer work when a vacancy is created due to the absence of a full-time teacher. The system calls a list of per-diem substitute teachers that the district has on file to fill the full-time teacher absence and offer work to the substitutes.

By letter dated June 2022, the employer advised the claimant that the employer intended to employ her again as a substitute teacher in the 2022-2023 school year under substantially the same economic terms and conditions as during the 2021-2022 school year. The letter was signed by the Chief Executive Director for Human Resources who has the authority to hire substitute teachers.

The Chief Executive Director for Human Resources testified for the employer. He has held his position since April 2022 and was trained on how to use the AESOP system. His duties include running reports and analyzing data from the system. The witness testified that someone seeking to be hired as a substitute teacher fills out an application for consideration and upon hire, the information from that application is transferred to the employer's human resources system and to the AESOP system. There was no testimony as to what information is provided by the substitute or how the information provided is transferred to the AESOP system. The witness testified that the AESOP system places calls to substitutes to fill vacancies when full-time teachers are absent. However, there was no testimony provided about when the calls are made or the contents of the calls. The witness was also not aware of the order in which names on the list are called.

OPINION: Pursuant to Labor Law § 590 (10), reasonable assurance exists when

the employer expresses a good-faith willingness to place the claimant's name on a list from which substitutes are called to work and the employer will, in good faith, consider the possibility of offering per diem work to this

claimant, and the economic terms and conditions in the new school year are not expected to be substantially less favorable than in the prior year. It is the responsibility of the employer to demonstrate with competent testimony from knowledgeable witnesses concerning the employer's personnel practices and procedures that these basic conditions have been met. Absent proof that these conditions have been satisfied, there is no reasonable assurance of employment in an instructional capacity as a per diem substitute teacher or as a substitute paraprofessional (See Appeal Board Nos. 552093 and 551885). The court has held that both the compilation and use of the list to call substitutes must be explained on the record (See Matter of Sandick, 197 A.D.2d 737).

At the outset, we note that the fact that the employer's letter of June 2022 does not specifically state that the claimant's name was or would be on a substitute list does not invalidate the letter, as federal guidelines do not impose such a requirement. The only requirements for an offer of reasonable assurance are that the offer is made by someone in authority to make such offer, that the employment offered is in the same capacity and that the economic conditions of the job offered are not considerably less than the economic terms and conditions in the first academic term or year. The employer's letter here meets all three criteria and is, therefore, sufficient.

However, we find that the evidence fails to establish that the employer's witness was competent to testify as to the compilation and use of the employer's system used to offer work to substitutes. With respect to compilation of the list, the employer offered no testimony as to what information is entered into the system or how information is transferred from the substitute's application into the AESOP system. With respect to the use of the list, the witness provided no information about when calls to substitutes are made, what information is provided to a substitute who receives a call, or the order in which substitutes on the list are called. As such, there is no proof that the claimant had as much chance as any other substitute on the list to be called and offered work as a substitute teacher. In the absence of competent testimony or evidence as to how the system is compiled and used to offer work to substitutes, there is no evidence that the employer intended to make a good faith effort to offer substantially the same work to the claimant in the next school year. Lacking such competent evidence, we must conclude that the provisions of LL 590(10) therefore do not apply to the claimant.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determination, holding, effective June 27, 2022, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10), is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER